It appears that as to three of these townships the surveys were not approved until February 20, 1854, and as to the other townships the surveys of two were approved October 11, 1854, and of the others on dates ranging from February 6, 1855, to October 3, 1891.

It is evident from a consideration of the terms of the enabling act, section seven, that Congress did not make an unconditional grant *in praesenti* to the State of the school sections; the terms of the grant are that the sections "shall be" granted. Moreover, the grant contemplated that Congress might make other disposition of the lands. The State of Wisconsin's right to the lands in controversy was to be subordinate to such disposition; in which event the State should seek indemnity in other lands for the loss of school sections.

The Menominee Indians by the treaty of 1848 gave up their holdings in Wisconsin, but were not removed to the lands provided for them in the West. They had the privilege of remaining in Wisconsin for two years and until notified by the President that the lands were wanted, this permission was extended, ultimately until October, 1852, in the meantime the Indians were located by the action of the Superintendent of Indian Affairs, and by the act of Congress, with the approval of the President, upon the reservation created in 1852. True, the act of Congress appropriating money for the removal referred to the temporary character of the location, but they were thus located subject to the control of Congress, and, as we have seen, with the consent of the State, if that were needed.

We think this recited action was a disposition, prior to survey, of the school sections, which was clearly within the authority of Congress to make and sanctioned by the terms of section seven of the enabling act. This action being before survey took these lands out of the scope of the grant for school purposes, and made them subject

to ultimate disposition by Congress for the benefit of the Indians. This was accomplished by the treaty of 1854 which adds to the reserved lands six townships on the west and includes the six westerly townships of the reservation of 1852. That treaty is comprehensive in its terms, it recites the unwillingness of the Indians to remove to the lands provided for them to the west of the Mississippi River, and sets forth the purpose to exchange those lands for the lands desired by the Tribe for a permanent home. To that end the Menominee Indians agreed to cede, and did cede, to the United States all lands assigned to them under the treaty of October 18, 1848, and in consideration of this cession the United States gave to the Indians, for a home to be held as Indian lands are held, the lands described in the treaty, in the 12 townships to which we have referred. The occupancy and rights of the Indians so established have never been terminated, but still continue.

In view of these statements of fact, and the purposes of the Government and the Indians in the transactions referred to, we regard the case as controlled by the decision of this court in *United States* v. *Morrison*, 240 U. S. 192, which deals with a similar grant of lands for school purposes to the State of Oregon. In that case the previous decisions of this court were reviewed, and in concluding the discussion of the effect of such school land grants this court said: "The designation of these sections was a convenient method of devoting a fixed proportion of public lands to school uses, but Congress in making its compacts with the States did not undertake to warrant that the designated section would exist in every township, or that, if existing, the State should at all events take title to the particular lands found to be therein. Congress did undertake, however, that these sections should be granted unless they had been sold or otherwise disposed of; that is, that on the survey, defining the sec-

tions, the title to the lands should pass to the State provided sale or other disposition had not previously been made, and, if it had been made, that the State should be entitled to select equivalent lands for the described purpose." (240 U. S. 201.)

The principles, thus stated, are applicable here. In our view the lands were *otherwise disposed of* by the Indian reservation of 1852, and the treaty of 1854. As we have seen, these dispositions were made before final approval of the surveys identifying sections 16.

It is insisted that this conclusion is inconsistent with the decision of this court in *Beecher* v. *Wetherby*, 95 U. S. 517. The same contention as to the effect of that decision was made in the *Morrison Case*, *supra*, and of it this court said (p. 205):

"In opposition to this definition of the effect of the donation for school purposes, the appellees rely upon what was said in *Beecher* v. *Wetherby*, 95 U. S. 517. That was an action of replevin to recover logs cut on a section sixteen in Wisconsin which had been granted by the Enabling Act of August 6, 1846 (c. 89, 9 Stat. 56, 58). The exterior lines of the township in which the land was situated were run in October, 1852, and the section lines in May and June, 1854; and the defendant claimed under patents from the State issued in 1865 and 1870. The land had been occupied by the Menominee Indians, but their right was only that of occupancy. 'The fee was in the United States, subject to that right, and could be transferred by them whenever they chose.' By the treaty of 1848 (9 Stat. 952) these Indians agreed to cede to the United States all their lands in Wisconsin, it being stipulated that they should be entitled to remain on the lands for two years. In view of their unwillingness to withdraw, a further act was passed (10 Stat. 1064) by which a tract was assigned to them embracing the land in controversy. Subsequently, a portion of this reservation

was assigned by another treaty to the Stockbridge and Munsee tribes, and for the benefit of the latter Congress passed the Act of February 6, 1871 (16 Stat. 404, c. 38) providing for the sale of certain townships. The plaintiff asserted title under patents issued by the United States in 1872 pursuant to this act. It appeared, however, that the Indian occupation of the land had ceased before the logs were cut. The court held that the title had vested in the State and hence that the plaintiff had acquired no title by his patents from the United States. It was said in the opinion that by the compact with the State (the school grant) the lands were 'withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted'; and that after this compact 'no subsequent sale or other disposition . . . could defeat the appropriation.' But it was also stated that 'when the logs in suit were cut, those tribes (Stockbridge and Munsee) had removed from the land in controversy, and other sections had been set apart for their occupation.' That is, the lands had been surveyed in 1854; prior to that time, there had been no other disposition of the fee by the United States; the title had vested in the State subject at most to the Indian occupancy, and this had terminated. There was abundant reason for the decision that these lands were not embraced, and were not intended to be embraced, in the provisions for sale made by the Act of 1871. What was said in the opinion must be considered in the light of the facts. (*Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 394.) The *Heydenfeldt Case* was not cited and cannot be regarded as overruled. See *New York Indians* v. *United States*, 170 U. S. 1, 18; *Minnesota* v. *Hitchcock*, 185 U. S. 375, 399–401."

See *Heydenfeldt* v. *Daney Gold & Silver Mining Co.*, 93 U. S. 634; *United States* v. *Thomas*, 151 U. S. 577;

Minnesota v. *Hitchcock*, 185 U. S. 373; *Wisconsin* v. *Hitchcock*, 201 U. S. 202.

We reach the conclusion that the lands in controversy did not pass under the school lands grant to the State of Wisconsin, and that there should be a decree for the defendant.

It is so ordered.

MR. JUSTICE MCREYNOLDS took no part in the consideration or disposition of this case.